Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party)

HIGH COURT (KUCHING) — CIVIL APPEAL NO KCH-12A-2/2 OF 2015
ALWI ABDUL WAHAB JC
26 JUNE 2015

Civil Procedure — Appeal — Competency of appeal — Appeal arising from claim for special and general damages — Third party notice claiming for contribution and/or indemnity against third party — Application to amend writ and statement of claim to include additional claim for cost of professional care — Application dismissed by sessions court — Whether decision appealable — Whether decision disposed final rights of parties — Whether decision given by sessions court constituted a decision — Courts of Judicature Act 1964 s 3

The appellant brought an action in the sessions court against the respondents claiming for special and general damages for tort allegedly committed by the respondents in a road accident. The respondents had taken out the third party notice against the third party claiming for contribution and/or indemnity against the third party in respect of the appellant's claim. Before the court resumed for continuation of trial, the appellant filed an application ('encl 75') under O 20 r 5 and O 92 r 4 of the Rules of Court 2012 ('the ROC') to amend the writ and statement of claim to include additional claim for 'cost of professional care'. This application was dismissed by the SCJ and hence, this appeal by the appellant. The respondent raised a preliminary objection ('the PO') on the ground that the appellant's appeal was not competent as the decision upon which this appeal was lodged did not dispose the final rights of the parties. In other words the decision given by the sessions court judge ('SCJ') did not constitute a decision defined under s 3 of the Courts of Judicature Act 1964 ('CJA'). The respondents submitted that the appellant's appeal was not competent because the ruling delivered by the SCJ was a ruling made in the course of a trial or hearing of any course or matter which did not finally dispose the rights of the parties and was therefore non-appealable.

Held, dismissing the appeal with costs of RM3,000:

(1) It was obvious that the SCJ's decision was made in the course of a trial or hearing which did not have the effect of finally disposing the rights of the parties. As such this decision did not constitute a 'decision' for the purpose of s 3 of the CJA and would render it to be non-appealable (see para 9).

(2) The appellant's reliance on O 55 r 5(1) of the ROC, upon which this

appeal was based, could not sustain as the decision of the SCJ in the present case did not come under the definition of a 'decision' under s 3 of the CJA. Thus, the SCJ's decision was non-appealable. The phrases 'any decision other than a decision made after trial by the court' in O 55 r 5(1) of the ROC, may in all probability refer to all interlocutory decisions but the definition of 'decision' in s 3 of the CJA barred appeals from the decision made in the course of a trial or hearing as in the present case (see para 10).

(3) Order 55 r 5(1) of the ROC read in its own context is not at all contradictory to the definition of 'decision' in the CJA. Both are complementing each other and in the event of any inconsistency the CJA being the parent Act shall prevail (s 4 of the CJA). It followed that since there was no definition for a 'decision' under the ROC, the definition under s 3 of the CJA should be adopted. This would not however render O 55 r 5(1) of the ROC meaningless because there were other interlocutory decisions by the lower courts in summary judgement applications and striking out applications which would finally dispose the rights of the parties could still be appealed. The key words were so long as the decision was made in the course of a trial or hearing of any course or matter, it would not be appealable (see para 11).

[Bahasa Malaysia summary

Perayu membawa tindakan di mahkamah sesyen terhadap responden-responden menuntut ganti rugi khas dan am bagi tort yang didakwa dilakukan oleh responden-responden dalam kemalangan jalan raya. Responden-responden telah mengeluarkan notis pihak ketiga terhadap pihak ketiga menuntut untuk penyumbangan dan/atau indemniti terhadap pihak ketiga berkaitan tuntutan perayu. Sebelum mahkamah memulakan semula penyambungan perbicaraan, perayu memfailkan permohonan ('lampiran 75') di bawah A 20 k 5 dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk meminda writ dan pernyataan tuntutan untuk memasukkan tuntutan tambahan bagi 'cost of professional care'. Permohonan ini ditolak oleh hakim mahkamah sesyen dan maka, rayuan ini oleh perayu. Responden membangkitkan bantahan permulaan ('BP') atas alasan bahawa rayuan perayu bukan kompeten kerana keputusan atas rayuan ini dimasukkan tidak melepaskan hak terakhir pihak-pihak. Dalam perkataan lain keputusan yang diberikan oleh hakim mahkamah sesyen ('HMS') tidak membentuk keputusan yang dimaksudkan di bawah s 3 Akta Mahkamah Kehakiman 1964 ('AMK'). Responden-responden berhujah bahawa rayuan perayu tidak kompeten kerana perintah yang diputuskan oleh HMS adalah perintah yang dibuat dalam perjalanan perbicaraan atau pendengaran yang tidak akhirnya melepaskan hak pihak-pihak dan oleh itu tidak boleh dirayu.

Diputuskan, menolak rayuan dengan kos sebanyak RM3,000:

(1) Adalah jelas bahawa keputusan HMS dibuat dalam perjalanan perbicaraan atau pendengaran yang tidak mempunyai kesan yang akhirnya melepaskan hak pihak-pihak. Oleh itu keputusan ini tidak membentuk 'decision' bagi tujuan s 3 AMK dan akan menyebabkan ia tidak boleh dirayu (lihat perenggan 9).

(2) Pergantungan perayu atas A 55 k 5(1) KKM, atas mana rayuan ini didasarkan, tidak akan kekal kerana keputusan HMS dalam kes ini tidak terangkum di bawah maksud 'decision' di bawah s 3 AMK. Oleh itu, keputusan HMS tidak boleh dirayu. Frasa 'any decision other than a decision made after trial by the court' dalam A 55 k 5(1) KKM, boleh dalam kesemua kebarangkalian merujuk kepada kesemua keputusan interlokutori tetapi maksud 'decision' dalam s 3 AMK menghalang rayuan-rayuan daripada keputusan yang dibuat dalam perjalanan perbicaraan atau pendengaran seperti dalam kes ini (lihat perenggan 10).

(3) Aturan 55 k 5(1) KKM dibaca dalam konteksnya sendiri tidak langsung bercanggah kepada maksud 'decision' dalam AMK. Kedua-duanya saling melengkapi dan jika terdapat apa-apa yang tidak konsisten AMK sebagai Akta induk akan mengatasi (s 4 AMK). Ia diikuti bahawa memandangkan tidak terdapat definisi untuk a 'decision' di bawah KKM, definisi di bawah s 3 AMK patut digunakan. Ini tidak akan walau bagaimanapun menyebabkan A 55 k 5(1) KKM tidak bererti kerana terdapat keputusan-keputusan interlokutori yang lain oleh mahkamah bawahan dalam permohonan penghakiman ringkas dan permohonan pembatalan yang akan akhirnya melepaskan hak pihak-pihak masih boleh dirayu. Perkataan utama adalah asalkan keputusan dibuat dalam perjalanan perbicaraan atau pendengaran apa-apa tindakan atau perkara, ia tidak akan boleh dirayu (lihat perenggan 11).]]]]

Notes

Fos cases on appeal in general, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 793–1970.

Cases referred to

Anthony @ Alexander Ak Banyan v Bodco Engineering & Construction Sdn Bhd & Anor [2011] MLJU 833; [2011] 1 LNS 1282, HC (refd)

Sim Yaw Boon @ Sim Yiaw Boon v Chieng Tiong Chung [2009] MLJU 596; [2010] 4 CLJ 520, HC (folld)

Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495; [2003] 2 CLJ 177, CA (refd)

Wood View Engineering Sdn Bhd v Lim Chan Kwang [2006] 3 MLJ 470; [2006] 5 CLJ 62, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 4
Rules of Court 2012 O 20 r 5, O 55 r 5(1), O 92 r 4
Subordinate Court Rules 1980 O 49 r 6(1)

Sabjit Singh (Joseph Kahell Baling with him) (Khaira & Co) for the appellant.
Allan Lao (David, Allan, Sagah & Teng) for the first and second respondents.
Robert Jawan (Tang & Partners) for the third party.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] This is an appeal by the plaintiff ('the appellant') against the ruling made by the learned sessions court judge ('SCJ') in dismissing the appellant's application for amendment of the writ and statement of claim.

[2] The appellant was the rider of motorcycle bearing registration No QKY 997. The first defendant was the driver of a van bearing registration No QKD 293 ('the van') and the second defendant being the registered owner of the van (the first and second defendants collectively referred to as the respondents). The third party was the driver of a taxi bearing registration No HQ 1502.

BRIEF FACTS

[3] The appellant brought an action in the sessions court against the respondents claiming for special and general damages for tort allegedly committed by the respondents in a road accident occurred on 1 April 2011 at about 8.30am along Jalan Batu Kawa. The respondents had taken out the third party notice against the third party claiming for contribution and/or indemnity against the third party in respect of the appellant's claim.

[4] The trial in the sessions court had commenced on 9 October–19 November 2014 where one witness had concluded giving evidence. Dates were given for the continuation of the trial. Before the court resumed for continuation of trial, the appellant filed an application (encl 75) under O 20 r 5 and O 92 r 4 of the Rules of Court 2012 ('the ROC') dated 18 December 2014, to amend the writ and statement of claim dated 6 June 2013 to include additional claim for 'cost of professional care' as stated under para 9(i.i) of the proposed amended writ and statement of claim. This application was dismissed by the learned SCJ on 6 February 2015, hence this appeal by the appellant.

[5] Prior to the hearing of this appeal, learned counsels for the respondents and the third party wrote a letter dated 17 April 2015 to the appellant's

advocates stating that they will be raising preliminary objection ('the PO') on the ground that the appellant's appeal was not competent as the decision upon which this appeal was lodged does not dispose the final rights of the parties. In other words the decision given by the learned SCJ does not constitute a decision defined under s 3 of the Courts of Judicature Act 1964 ('the CJA').

PRELIMINARY OBJECTION

[6] Learned counsel for the appellant cited the case of *Wood View Engineering Sdn Bhd v Lim Chan Kwang* [2006] 3 MLJ 470; [2006] 5 CLJ 62 to support his contention that this appeal was competent. He further submitted that the facts in *Wood View*'s case is similar to the present case ie in both cases, the appeal was against the decision of the subordinate court in disallowing the plaintiff's application to amend the statement of claim. In *Wood View*, the preliminary objection was dismissed as the High Court was of the view that the decision was appealable being a decision given by the court other than decision made after trial pursuant to O 49 r 6(1) of the Subordinate Court Rules 1980. This provision has been incorporated into O 55 r 5(1) of the ROC 2012.

[7] On the other hand, learned counsel for the respondents submitted that the appellant's appeal was not competent because the ruling delivered by the learned SCJ on 6 February 2015 was a ruling made in the course of a trial or hearing of any course or matter which does not finally dispose the rights of the parties and is therefore non-appealable. He cited the case of *Sim Yaw Boon @ Sim Yiaw Boon v Chieng Tiong Chung* [2009] MLJU 596; [2010] 4 CLJ 520 where the High Court held that the decision of the learned SCJ in allowing the defendant's objection as regards to the admissibility of certain documents intended to be adduced by the plaintiff before the start of the trial was non-appealable. Learned counsel for the respondents also cited the case of *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495; [2003] 2 CLJ 177 which case was followed in *Sim Yaw Boon*'s case. The Court of Appeal in *Syarikat Tingan Lumber Sdn Bhd* held that 'any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose the rights of the parties does not constitute a 'decision' for the purpose of s 3 of the CJA as amended'.

[8] In similar vein, learned counsel for the third party submitted that the learned SCJ's decision was made in the course of trial or hearing of cause or matter and it does not constitute a 'decision' for the purpose of s 3 of the CJA. He cited the case of *Anthony @ Alexander Ak Banyan v Bodco Engineering & Construction Sdn Bhd & Anor* [2011] MLJU 833; [2011] 1 LNS 1282 in which case it was held that whether a decision was made in the course of a trial or hearing is of critical importance in applying the definition of 'decision' in s 3

of the CJA following the observation made by Pajan Singh Gill JCA in *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* as follows:

> Equal weight should be attached to the entire sentence of s 3 of the CJA as amended. What must be asked is not only whether a ruling does not dispose the final rights of the parties but also whether it was a ruling made in the course of a trial or hearing of any cause or matter. If it was not a ruling made in the course of a trial or hearing of any cause or matter, regardless of the fact that it did not dispose of the rights of the parties, it would be appealable.

[9] In the present case, it is obvious that the learned SCJ's decision was made in the course of a trial or hearing which does not have the effect of finally disposing the rights of the parties. As such this decision does not constitute a 'decision' for the purpose of s 3 of the CJA and would render it to be non-appealable.

[10] The appellant's reliance on O 55 r 5(1) of the ROC 2012, upon which this appeal is based, could not sustain as the decision of the learned SCJ in the present case does not come under the definition of a 'decision' under s 3 of the CJA. Thus the learned SCJ's decision is non-appealable. The phrases 'any decision other than a decision made after trial by the court' in O 55 r 5(1) of the ROC 2012, may in all probability refer to all interlocutory decisions but the definition of 'decision' in s 3 of the CJA bars appeals from the decision made in the course of a trial or hearing as in the present case (*Anthony @ Alexander Ak Banyan v Bodco Engineering & Construction Sdn Bhd & Anor*).

[11] I adopt the view made by Rhodzariah Bujang JC (as she then was) in *Sim Yaw Boon @ Sim Yiaw Boon v Chieng Tiong Chung*, that O 55 r 5(1) of the ROC 2012 read in its own context is not at all contradictory to the definition of 'decision' in CJA. Both are complementing each other and in the event of any inconsistency the CJA being the parent Act shall prevail (s 4 of the CJA). It follows that since there is no definition for a 'decision' under the ROC 2012, the definition under s 3 of the CJA should be adopted. This would not however render O 55 r 5(1) of the ROC 2012 meaningless because there are other interlocutory decisions by the lower courts in summary judgement applications and striking out applications which would finally dispose the rights of the parties could still be appealed. The key words are so long as the decision is made in the course of a trial or hearing of any course or matter, it would not be appealable (*Syarikat Timber Lumber Sdn Bhd v Takang Timber Sdn Bhd*).

A CONCLUSION

[12] In conclusion, I allow the respondents and the third party's PO and rule that the appellant's appeal is incompetent as the decision of the learned SCJ is non-appealable.

B APPEAL PROPER

[13] In view of my finding above, I shall dismiss the appellant's appeal against the learned SCJ's decision without having to consider the merits of the appeal. Costs of RM3,000 in favour of the respondents and the third party to be equally shared.

C *Appeal dismissed with costs of RM3,000.*

D Reported by Afiq Mohamad Noor

E

F

G

H

I